UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 96-76-P-C***
	)	***(Civil No. 00-119-P-C)***
JAMES CRUZ,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

The defendant, appearing *pro se*, moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. The defendant was convicted by a jury of conspiracy to possess cocaine base with the intent to distribute, using a firearm in connection with a drug trafficking crime, possession of a firearm by a felon (two counts), possession of ammunition by a felon, possession of an unregistered firearm and possession of a firearm in and affecting commerce, in violation of 18 U.S.C. §§ 922(g)(1), 922(g)(3), 924(c)(1) and 924(e)(1); 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846; and 26 U.S.C. §§ 5841, 5861(d) and 5871. Judgment (Docket No. 97) at 1. He was sentenced to a term of 420 months. *Id*. at 3. He contends that he received constitutionally insufficient assistance of counsel at trial and on appeal. Motion Under 28 USC § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Petition") (Docket No. 120) at 5-6A.

A section 2255 petition may be dismissed without an evidentiary hearing if "(1) the motion is inadequate on its face, or (2) the movant's allegations, even if true, do not entitle him to relief, or (3) the movant's allegations need not be accepted as true because they state conclusions instead of facts, contradict the record, or are inherently incredible." *David v. United States*, 134 F.3d 470, 477 (1st

Cir. 1998) (internal quotation marks and citation omitted). In this instance, each of the defendant's allegations meets one or more of these criteria and I accordingly recommend that the petition be denied without an evidentiary hearing.

I. Background

As the First Circuit stated in its opinion on the defendant's direct appeal,

> [a]t approximately 1:22 a.m. on August 23, 1996, [the defendant] was detained by a state policeman for driving at 88 mph, which is in excess of the legal speed limit of 65 mph for the Maine Turnpike. As the officer approached [the defendant's] vehicle, he observed a commotion among the occupants. . . . The officer asked [the defendant] to step outside the vehicle and to produce his driver's license, vehicle registration and insurance documentation. While this was taking place, the officer noticed that [the defendant's] shirt was untucked, whereupon he asked [the defendant] to lift his shirt so that his waistband was exposed. Nothing unusual was revealed.
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> The officer then conducted a patdown search of [the defendant], during the course of which he discovered a jackknife and a syringe and needle in his pants pockets. [The defendant] was placed under arrest for possession of illegal drug paraphernalia.
>
> After [the defendant] was arrested, the officer proceeded to search the other occupants of the car. The sum of $5,000 cash was discovered in the purse of the female passenger, who was later identified as [the defendant's] then-girlfriend Ericka Thibodeau, and a 9-mm pistol was recovered from her person. Thereafter, the officer found an ammunition magazine for the pistol on the floor of the car between the front and back seats. An additional magazine and three loose rounds were later found on the floor of the officer's car, directly behind where [the defendant] had been placed after his arrest. Two rounds of 9-mm ammunition were also found tucked between the cushions of the seat that [the defendant] had occupied.
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> * * *
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> In Count I of the indictment, [the defendant] was charged with engaging in a conspiracy to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846. At least 8 witnesses testified that throughout the summer of 1996, they and others purchased crack cocaine from [the defendant]. Each of these witnesses corroborated the other seven, and their testimony was also confirmed by the introduction of evidence seized from [the defendant's] premises, which included cash, drugs, and drug paraphernalia. . . .
>
> [T]he evidence is equally overwhelming that [the defendant] carried the 9-mm pistol that was introduced into evidence during the various phases of

> his drug deals, including during purchases, transportation, and, most bone-chillingly described by several witnesses, during drug-debt-collection episodes.
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> * * *
>
> Count X is again a variation of the prior felon-in-possession theme, this one involving a sawed-off shotgun. Witnesses testified that the shotgun was purchased and paid for at [the defendant's] behest, and that thereafter he took possession of this weapon. [The defendant] was a felon and he was in possession of a firearm . . . .
>
> In Count XI, [the defendant] was charged with possessing an unregistered sawed-off shotgun in violation of 26 U.S.C. §§ 5841, 5861, and 5871. A witness testified to helping [the defendant] to saw the barrel off the shotgun referred to in Count X, which in fact he thereafter used to terrorize this same witness. This weapon was less than 26" overall, with a barrel shorter than 18", and was not registered in [the defendant's] name in the National Firearms Registration and Transfer Record.

United States v. Cruz, 156 F.3d 22, 25-27 (1st Cir. 1998). Evidence was "seized from [the defendant's] premises" in connection with his arrest on September 4, 1996 in Auburn, Maine after Thibodeau reported that he had assaulted her. Trial Transcript, Volume I ("Tr. I") (Docket No. 105) at 28-32, 39-54, 157-62. The defendant's direct appeal was unsuccessful. 156 F.2d at 31.

II. Procedural Issues

In its opposition to the petition, the government points out that the defendant failed to sign the form petition which sets forth his seven specific claims and that the memorandum he submitted with the petition was signed but not sworn. Government Opposition to Motion to Vacate, Set Aside or Correct Sentence, etc. ("Government's Opposition") (Docket No. 128) at 6-7; *see* Petition at 7 and Memorandum of Law in Support of §2255 Motion ("Defendant's Memorandum"), attached thereto, at 36. The government argues that the petition should be dismissed due to the absence of any sworn factual allegations, citing *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995). Government's Opposition at 6-7. After receiving the government's opposition, the defendant filed Petitioner's Declaration in Support of Petitioner's Supplemental Pleading, and Affidavit (Docket No.

129), in which he declares pursuant to 28 U.S.C. § 1746 that all of the allegations in his initial pleadings are true, correct and accurate, *id*. at 3. The defendant also filed an affidavit (Docket No. 130) adding factual allegations in support of his petition and a revised form petition with his signature (attached to the original petition).

Because the defendant cured the significant procedural deficiencies in his petition before the court was able to consider the petition, it would exalt form over substance to an untenable degree to dismiss the petition without consideration of its merits.

III. The Petition's Claims

The defendant contends that his trial and appellate counsel provided constitutionally insufficient assistance in the following specific ways: (i) failing to challenge the constitutionality of a New York state conviction that was used to enhance the defendant's sentence; (ii) failing to request a competency examination and hearing; (iii) withdrawing a motion to suppress the evidence found at the Auburn apartment where the defendant was arrested on the state assault charge; (iv) failing to inspect discovery material provided by the government before trial; (v) failing to argue on appeal that trial counsel had been constitutionally ineffective in three specific ways; (vi) failing to request a jury instruction on the limited significance of the defendant's prior convictions;[1] and (vii) failing to challenge the court's refusal to give a particular requested jury instruction.

Strickland v. Washington, 466 U.S. 668 (1984), provides the applicable standard for assessing whether a defendant has received ineffective assistance of counsel such that his Sixth Amendment right to counsel has been violated. First, the defendant must show that his counsel's performance was deficient, i.e., that the attorney "made errors so serious that counsel was not

[1] The petition also alleges that trial counsel failed to request a "special narcotics addiction instruction[]" with respect to witnesses, Petition at 6A, but that claim was withdrawn by the defendant in Petitioner's Reply to Govt's [sic] Response[] to Petitioner's Motion to Vacate or Set-Aside [sic] Conviction ("Defendant's Reply") (Docket No. 132) at 20.

functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. Second, the defendant must make a showing of prejudice, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. The court need not consider the two elements in any particular order; failure to establish either element means that the defendant is not entitled to relief. *Id*. at 697. The "prejudice" element of the test presents the defendant with a high hurdle. He must show more than a possibility that counsel's errors had some conceivable effect on the outcome of the proceeding. Rather, he must affirmatively prove a reasonable probability that the result of the proceeding would have been different if not for counsel's errors. *Argencourt v. United States*, 78 F.3d 14, 16 (1st Cir. 1996).

A. The New York Conviction

The defendant contends that his trial counsel provided constitutionally deficient assistance at sentencing by failing to challenge the constitutionality of a New York conviction for attempted sale of a controlled substance that was used to enhance his sentence. Petition at 5; Defendant's Memorandum at 8-12. This conviction, along with one for attempted aggravated battery, was used pursuant to section 4B1.1 of the United States Sentencing Commission Guidelines ("U.S.S.G.") to find that the defendant was a career offender, resulting in an offense level of 37 rather than the level of 36 calculated in the absence of such status, and was used, again in concert with the battery conviction, to determine that the defendant was an armed career criminal within the meaning of U.S.S.G. § 4B1.4, resulting in an offense level of 34 which was disregarded by the terms of that guideline because the offense level calculated under § 4B1.2 was higher. Memorandum of Sentencing Judgment (Docket No. 96) at 3. The government had filed the information required by 21 U.S.C. § 851(a), charging that the defendant had been convicted on the New York charge of attempted criminal sale of a controlled substance, before trial. Information Charging Prior Conviction (Docket No. 44). Counsel for the

defendant apparently did not file a written response to the information claiming that the New York conviction had been obtained in violation of the Constitution and, accordingly, any challenge to the use of the conviction to increase the defendant's sentence was waived. 21 U.S.C. § 851(c)(2).

The record reveals that, contrary to the defendant's broad statement, his trial counsel did object to the use of the New York conviction to enhance his sentence, albeit not on the ground now asserted by the defendant. The defendant's attorney filed an objection to the presentence investigation report ("PSI") contending that the defendant was not guilty of the crime but pleaded guilty because he was unable to make bail and his plea would result in an earlier release. Revised Presentence Investigation Report at 31. At the sentencing hearing, the defendant testified in support of these assertions. Transcript of Sentencing Proceedings (Docket No. 110) at 9-14. Counsel for the defendant stated that this evidence was not presented as a collateral attack on the conviction but rather to show that the suggested Guideline range overstated the defendant's criminal history. *Id*. at 9. In the present proceeding, the defendant contends that his New York conviction was obtained in violation of the Constitution because his plea was not made knowingly and intelligently. Defendant's Memorandum at 8. This is so, he contends, because he was taking medications at the time which had "the potential to cause disorientation and hallucinations, or at the very least, impair judgment," *id*. at 9; he was under the care of a psychiatrist, *id*. at 11; he informed the judge who took his plea that he had not been given his medications the night before and as a result was "all worked up," *id*. at 9, 11; and he later denied guilt in his presentence interview with the probation office, *id*. at 9. In support of these allegations the defendant has submitted a partial transcript of the state sentencing proceeding, Exh. A to Defendant's Memorandum, and the affidavit of his trial counsel in the instant case, dated August 18, 1998, Exh. A(second) to Defendant's Memorandum, in which that attorney reports that he spoke with the attorney who represented the defendant on the New York charge and that that attorney informed him that a judge

would not accept a guilty plea and impose sentence if a defendant denied guilt during the probation interview.

The government responds that a defendant has no right in a federal sentencing proceeding to collaterally attack the validity of a prior state conviction that is being used to sentence him as an armed career criminal, citing *Custis v. United States*, 511 U.S. 485, 490-97 (1994). Government's Opposition at 10. The only exception to this rule applies when the conviction at issue was obtained in violation of the Sixth Amendment right to counsel, *Custis*, 511 U.S. at 496; *United States v. Cordero*, 42 F.3d 697, 701 (1st Cir. 1994), and it is clear from the defendant's own submissions that he was represented by counsel when he pleaded guilty to the New York charge. Therefore, the government contends, the challenge proposed by the defendant could not have succeeded and his trial counsel cannot be faulted for failing to make such an argument. *See United States v. Hart*, 933 F.2d 80, 83 (1st Cir. 1991).

The government's argument is correct. To the extent that one might argue that *Custis* dealt only with armed career criminal status under 18 U.S.C. § 924(e), 511 U.S. at 487, 490-91, and the Supreme Court distinguished such sentencing enhancements from those subject to collateral attack under 21 U.S.C § 851(c), *id*. at 491-92, it nonetheless is not necessary to consider the availability of a collateral constitutional attack on a state conviction used to enhance a sentence on the basis of career offender status.[2] Section 851 applies only to statutory sentence enhancement, not sentence enhancement under section 4B1.1 of the guidelines, *United States v. Mans*, 999 F.2d 966, 969 (6th Cir. 1993), and enhancement of the defendant's sentence in this case was imposed solely under the

[2] The government states that the defendant's "record of prior convictions made him both a Career Offender and an Armed Career Criminal. Both adjudications produced the same offense level of 37 and the same criminal history category of VI." Government's Opposition at 8 n.1. If the government means to suggest that either status would result in the same enhancement of the defendant's sentence, such a suggestion would be incorrect. The armed career criminal calculation for the defendant resulted in an offense level of 34, which was raised to a level of 37 only because the career offender calculation resulted in an offense level of 37. Memorandum of (continued…)

guidelines, Memorandum of Sentencing Judgment at 3. *See generally United States v. Burke*, 67 F.3d 1, 2-3 (1st Cir. 1995). Whether the defendant meant to attack the enhancement of his sentence based on his status as a career offender, an armed career criminal, or both, he is not entitled to relief on this ground.

B. Hearing on Competence

The defendant contends that his trial counsel failed to provide constitutionally adequate assistance because he failed to request a hearing on the defendant's competence to stand trial or an examination by a mental health practitioner on that issue. Petition at 5; Defendant's Memorandum at 13-15. The defendant lists the following facts as those that required his trial counsel to pursue such a course: (i) prior to and during trial, the defendant was taking the drug Trazadone, which had been prescribed for treatment of his bi-polar disease and which "had the potential to cause disorientation and hallucinations, or at least, impair judgment;" (ii) the defendant had a history of psychotherapy, irrational behavior and substance abuse dating back to 1978; (iii) the defendant "made several irrational outbursts in the courtroom, prior to and during the instant trial;" and (iv) the "heinous and unthinkable" nature of his alleged assault on Thibodeau. *Id*. at 13. In addition, the defendant argues that he was "sedated or under the influence of said medications [sic]" to a degree that prevented him from objecting to trial strategy of his attorney with which he now takes issue. *Id.* at 13-14.[3]

Significantly, the defendant does not allege that he was in fact unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. A hearing to determine the mental competence of a criminal defendant will be ordered only when there is reasonable cause to believe that the defendant is suffering from a mental disease or defect that will

Sentencing Judgment at 3.

[3] This assertion is directly contradicted by the defendant's affidavit. Affidavit in Support of Petitioner's Original Petition Section 2255 Motion (Docket No. 130) ¶ 5.

have such an effect. 18 U.S.C. § 4241(a). In the absence of such a factual assertion, the defendant cannot establish the second prong of the *Strickland* test; there can be no prejudice to the defendant from the lack of a formal inquiry into his competence if he was not in fact legally incompetent. *United States v. Makris*, 483 F.2d 1082, 1091 (5th Cir. 1973).

Even if this were not the case, the mere facts that the defendant was taking medication to treat a psychiatric condition and that he had abused drugs and had received psychiatric treatment in the past do not require a hearing on the defendant's competence to stand trial. *United States v. Pryor*, 960 F.2d 1, 2 (1st Cir. 1992). In the absence of irrational behavior or some other indication that the defendant did not understand the proceedings or could not assist in his defense, defense counsel's failure to seek a hearing did not fall below the Sixth Amendment standard. The defendant's factual allegations here fall far short of the facts presented in *Drope v. Missouri*, 420 U.S. 162, 164-71 (1975) (discussing need for court to order psychiatric examination of defendant when defense counsel had sought one by motion), upon which the defendant relies. The nature of the alleged attack on Thibodeau is not necessarily inconsistent with competence to stand trial and the

defendant provides no evidence of any irrational behavior on his part before or during trial. *See David*, 134 F.3d at 477-78 (conclusory allegations do not entitle petitioner to hearing).[4] Accordingly, the defendant is not entitled to relief on this basis.

C. The Motion to Suppress

The defendant next complains that his trial counsel's assistance fell below the constitutional standard when he withdrew a motion to suppress evidence gathered by police from the Auburn apartment where the defendant was found on September 4, 1996 after Thibodeau reported that he had assaulted her. Petition at 5;[5] Defendant's Memorandum at 15-21. As the government notes, Government's Opposition at 14, applicable law requires the defendant to demonstrate both that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence, *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). My analysis of this issue would be handicapped due to the failure of both parties to identify which evidence admitted at trial came from the Auburn apartment were it not for a list attached to the motion to suppress, on pages entitled Maine Drug Enforcement Agency Crime Scene Evidence Log. Docket No. 23.

The defendant attacks both the search performed by police at the time of his arrest and the search performed later pursuant to a search warrant, contending that the search warrant was obtained by an affidavit based upon the fruits of the initial, warrantless search. It is clear, contrary to the assertion of the government that the defendant was arrested "while he climbed out of the apartment in

[4] The defendant has filed three motions seeking copies of the transcripts of the hearings held on his motion to suppress evidence and at his sentencing. Docket Nos. 118, 122, 125. He cites to the transcript of his trial in his memorandum of law. *E.g.*, Defendant's Memorandum at 13, 19, 21, 24, 28, 29, 31, 32. It is incumbent upon him to direct the court's attention to any instance of irrational behavior on his part recorded in that transcript. The sentencing transcript would not reveal any such behavior that took place before or during trial. I have reviewed the transcript of the suppression hearing and find no such behavior recorded therein.

[5] The petition actually alleges that "[t]rial counsel was ineffective in failing to move to supress [sic] evidence obtained during an unlawful search," Petition at 5, but such a motion was filed. Defendant's Motion to Suppress Evidence (Docket No. 23) at [1]-[8]. The portion of the motion dealing with the search of the apartment was later withdrawn. Docket No. 33. The defendant takes the position (continued…)

an apparent effort to avoid the police," Government's Opposition at 14, that the defendant was apprehended as he entered a bedroom in the apartment by a police officer who was standing outside a window to that bedroom; the officer pointed his weapon at the defendant through the window, told the defendant to approach the window, and pulled the defendant through the window when he complied.[6] Tr. I at 30-31 (testimony of James Lawlor). The defendant was handcuffed, and another police officer removed $1,300 in cash and five wax paper packets from his pockets. *Id*. at 32. An officer or officers must have entered the apartment at this time, because the affidavit submitted in support of the application for a warrant to search the apartment recites that "[w]hile securing the apartment," officers observed "a plastic baggy containing a white substance that appeared to be cocaine or heroin and U.S. currency located on a piece of furniture in the living-room," syringes on the floor of the living room, and a piece of metal pipe behind the front door. Affidavit and Request for Search Warrant, dated September 4, 1996 and signed by Rick D. Coron, Special Agent, Maine Drug Enforcement Agency, copy attached to Defendant's Motion to Suppress Evidence ("Coron Aff."), ¶ 05.

The defendant maintains that he was arrested outside the apartment, after he had been pulled through the window, that the officers had no reason to believe that anyone else was in the apartment, and that their entry into the apartment before obtaining a warrant rendered all of the evidence later gathered from the apartment inadmissible. He also asserts, in conclusory fashion, that exclusion of

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that his trial counsel should have pressed the motion.

[6] Under Maine law, a law enforcement officer may arrest without a warrant a person who the officer has probable cause to believe has committed assault on a family or household member. 17-A M.R.S.A. § 15(1)(A)(5-A).

this evidence would have changed the outcome of the trial. Defendant's Memorandum at 18-21. He concedes that his trial counsel withdrew the motion "simply because counsel chose to pursue a defense that suggested that petitioner did not reside at said apartment and that the incriminating evidence did not belong to the petitioner," *id*. at 18, but contends that this was not the "sound" trial strategy that is protected from attack through section 2255, *Strickland*, 466 U.S. at 689; *Lema v. United States*, 987 F.2d 48, 51 (1st Cir. 1993), because under *Simmons v. United States*, 390 U.S. 377, 394 (1968), his attorney could have argued that the defendant was a resident of the apartment for purposes of the motion to suppress without preventing him from arguing at trial that the defendant was not a resident of the apartment. Defendant's Memorandum at 18-19. Of course, it is not only "sound" or "viable" trial strategy that is protected from Sixth Amendment attack pursuant to section 2255. Even "inane" trial strategy will not always entitle a defendant to relief. *Lyons v. McCotter*, 770 F.2d 529, 533 (5th Cir. 1985). The fact that several witnesses would testify at trial that the defendant was in fact residing at the apartment was not necessarily known to the defendant's attorney when he withdrew the motion to suppress. Trial counsel's conduct must be evaluated for purposes of a Sixth Amendment claim under section 2255 in light of the information known to him or available to him at the time of the challenged action or failure to act.

In any event, it is not necessary to resolve this issue on the basis of the validity of trial counsel's possible strategic decision. With respect to the majority of the counts on which the defendant was convicted, he cannot demonstrate that the outcome would have been different if the evidence taken from the apartment had been suppressed. Counts I, VII, VIII, and IX of the superseding indictment (Docket No. 15) deal with the possession and distribution of cocaine base and a weapon not found at the apartment. As the First Circuit found, "[a]t least 8 witnesses testified that throughout the summer of 1996, they and others purchased crack cocaine from [the defendant]. Each of these

witnesses corroborated the other seven." *Cruz*, 156 F.3d at 27. There was sufficient evidence to allow a jury to convict the defendant on Count I without any of the evidence taken from the apartment, and Counts VII-IX did not depend in any way on the evidence taken from the apartment. Left for consideration are Counts X-XII, which deal with the sawed-off shotgun found during the search of the apartment after a warrant was obtained.

The shotgun was found by the police only during the search following the issuance of the warrant. Tr. I at 424-28 (testimony of Rick Coron). The defendant contends that the application for that warrant was fatally tainted by the inclusion of references to evidence found during the officers' initial entry into the apartment after he was pulled through the window and handcuffed. Specifically, the supporting affidavit states:

> While securing the apartment during the arrest of Cruz, Auburn P.D. officers observed in plain-view [sic] a plastic baggy containing a white substance that appeared to be cocaine or heroin and U.S. currency located on a piece of furniture in the living-room [sic]. Syringes commonly used to inject heroin and cocaine were found in plain-view [sic] on the floor of the livingroom [sic]. Also observed in plain view by the Auburn Officers at 66 Goff St. on the livingroom [sic] floor, behind the front entry door, was a piece of metal pipe consistent with the metal object described by the victim used to strike her over the head.

Coron Aff. ¶ 05. The affidavit also recites Thibodeau's description of her beating by the defendant during the previous night, his use of weapons including a loaded shotgun during the assault, the defendant's use of heroin during the night, and her ingestion of a drug believed to be Xanax under compulsion by the defendant. *Id*. ¶ 02. It reports the arrest of the defendant and the fact that packets of a substance that might be heroin were found in his pockets. *Id*. ¶ 04. It attaches a photograph of the injured Thibodeau. *Id*. ¶ 03.

Assuming *arguendo* that the information in the affidavit about the items seen by the officers in the apartment after the defendant was arrested was illegally obtained, *see, e.g., United States v. Curzi*,

867 F.2d 36, 37-43 (1st Cir. 1989), the illegally obtained information "should be set to one side . . . and the remaining content of the affidavit examined to determine whether there was probable cause to search, apart from the tainted averments," *United States v. Ford*, 22 F.3d 374, 379 (1st Cir. 1994), quoting *United States v. Veillette*, 778 F.2d 899, 904 (1st Cir. 1985). Here, the affidavit easily meets this test. The warrant "would have been sought even if what actually happened had not occurred." *Murray v. United States*, 487 U.S. 533, 542 n.3 (1988). Accordingly, the motion to suppress the evidence taken from the apartment would not succeed as to the shotgun, which was found only after the warrant was issued and was the only piece of evidence taken from the apartment that was conceivably essential to the convictions on Counts X-XI. It necessarily follows that the outcome of the trial would not have been different if the defendant's attorney had pressed the motion to suppress the evidence taken from the apartment. The defendant's claim on this issue fails on the second prong of the *Strickland* test.

D. Discovery Material

The defendant contends that his attorney failed to inspect a wallet made available to him by the government during discovery sufficiently to discover a slip of paper inside the wallet that was offered into evidence against him, which the defendant characterizes as "a note that was written by the petitioner that served as a receipt that showed petitioner sublet the apartment" in Auburn from which some physical evidence was seized. Petition at 6; Defendant's Memorandum at 21. The defendant argues that, had the attorney seen this note in a timely manner, he would not have withdrawn the motion to suppress the evidence found in the apartment in the hope of pursuing a trial strategy based on a claim that the defendant did not reside in the apartment and that the evidence collected there was not related to him. *Id*. at 22. He also asserts that "this incriminating evidence was allowed into trial unchallenged." *Id*. The latter contention is simply incorrect; defense counsel did object to the

admission of the note. Tr. I at 162-64. The defendant does not suggest any basis for exclusion of the note other than those raised by his attorney at the time and none is apparent.

The defendant also fails to indicate when the wallet was made available to his attorney, making it impossible for this court to determine whether the attorney could have seen the note at issue before the decision was made to withdraw the motion to suppress. In any event, as discussed above, the fact that the motion to suppress was withdrawn could not have affected the outcome of the trial with respect to four of the seven charges facing the defendant and did not cause prejudice to the defendant. The fact that the note may have undermined a defense that the defendant was not a resident of the apartment cannot possibly have affected the outcome of the trial when several witnesses testified independent of the document that the defendant did occupy the apartment. *E.g.*, Tr. I at 74, 76 (testimony of Scott Montana); 118-19, 124 (testimony of Ericka Thibodeau); 255-56 (testimony of Rachel Hughes); 305-07 (testimony of Jeff Rubin); 340 (testimony of Debeorah Pelletier); 360 (testimony of Katherine Bradbury).

The defendant is not entitled to relief on this basis.

E. Appeal Issues

The defendant next contends that his trial counsel provided constitutionally insufficient assistance by allowing the admission at trial of evidence of uncharged acts, specifically the assault on Thibodeau, which in turn allowed prosecutorial misconduct and constructive amendment of the indictment, and that appellate counsel provided constitutionally ineffective representation by failing to so argue. Petition at 6A; Defendant's Memorandum at 23-30.

The claims of prosecutorial misconduct and constructive amendment require only brief consideration.[7] The defendant identifies the alleged prosecutorial misconduct as introducing or

[7] The government does not address these arguments in its opposition.

making reference to evidence of the assault "which it agreed it would not use," Defendant's Memorandum at 26, and finds this agreement at page 7 of the trial transcript, *id*. at 24. However, a review of the cited page reveals that the prosecutor represented that he would limit references to threatening conduct by the defendant *in his opening statement* to the incident involving victims other than Thibodeau. The statement cannot reasonably be interpreted as an agreement or promise not to introduce such evidence if and when the court ruled in the government's favor on the defendant's motion *in limine* to exclude evidence of the Thibodeau assault, on which the court had reserved its ruling. Tr. I at 7; Motion in Limine Regarding Other Crimes, Wrongs or Acts (Docket No. 40) and endorsement thereon. The motion *in limine* was withdrawn by defense counsel during trial, Tr. I at 152, and thereafter there was no "agreement" limiting the prosecutor's use of such evidence and no misconduct inherent in his presentation of it. With respect to the claim that the presentation of such evidence resulted in a constructive amendment of the indictment,

> [c]onstructive amendment occurs when the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.

United States v. Wallace, 59 F.3d 333, 337 (2d Cir. 1995) (internal quotation marks and citation omitted). The defendant points to no jury instruction that so modified the elements of any of the offenses charged and, after careful review, I conclude that there was none. The evidence at issue was irrelevant to the charges presented in Counts I, VII, VIII and IX and could not have modified the essential elements of those offenses in any way. The evidence in the record addresses all of the essential elements of the offenses charged. *See United States v. Santa-Manzano*, 842 F.2d 1, 2-3 (1st Cir. 1988). For that reason and those discussed in the following two paragraphs, I conclude that evidence of the assault on Thibodeau did not modify the essential elements of the charges in Counts X,

XI, and XII to the degree suggesting the possibility of constructive amendment. Accordingly, trial counsel's performance was not constitutionally deficient in this respect.

Defense counsel presented a motion *in limine* seeking to exclude evidence of the assault. Docket No. 40. He withdrew the motion during trial, Tr. I at 152, after the prosecutor argued to the court that such evidence was not evidence of other bad acts by the defendant but rather evidence of the charge set forth in Count XII under the standard set forth in *United States v. Elder*, 16 F.3d 733 (7th Cir. 1994). Tr. I at 8. Defense counsel stated that his withdrawal of the motion was "a strategic matter." *Id*. at 152. While the defendant admits that his trial counsel sought to impeach Thibodeau by showing that she lied about the assault, he contends that this decision may not be considered to be a matter of sound trial strategy which may not be second-guessed on section 2255 review due to the "highly inflammatory" nature of the evidence about the assault, which "gave the jury a whole new different reason to convict the defendant." Defendant's Memorandum at 25. From all that appears, defense counsel's strategic decision in this regard is precisely the sort of tactical decision that may not be subjected to section 2255 review under *Strickland*. Even if that were not the case, however, the admission of this evidence as evidence of the crime charged rather than as evidence of other bad acts is supported in the case law.

The defendant argues that admission of evidence concerning the assault violated Fed. R. Evid. 403 and 404(b). Defendant's Memorandum at 24. However, Rule 404(b)[8] applies to evidence of other acts "not intricately related to the charged offense." *Elder*, 16 F.3d at 737. "[D]irect evidence of an essential part of the crime charged is not covered by Rule 404(b)." *Id.* In this circuit, "evidence of . . . contemporaneous uncharged conduct may be admissible to complete the story of a crime by

[8] Fed.R.Evid. 404(b) provides, in relevant part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ."

proving the immediate context of events in time and place." *United States v. Currier*, 821 F.2d 52, 55 (1st Cir. 1987) (in trial on charge of unlawful possession of firearm, testimony that defendant referred to violent crimes that could be perpetrated with gun at issue, which he was trying to sell, not barred by Rule 404(b)). Because evidence of the assault in which the defendant held the sawed-off shotgun to Thibodeau's head after both had consumed illegal drugs was "closely intertwined" with the charged offense of possession of the shotgun while a user of a controlled substance, "providing both significant contextual material and proof that the defendant possessed the gun," the evidence was not barred by Rule 404(b), *id*., and trial counsel did not err in withdrawing the motion to exclude evidence of the assault.

Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The First Circuit has already ruled that the trial court did not abuse its discretion by admitting some of the evidence of the assault — the photographs of Thibodeau's injuries — which the defendant challenged on appeal under Rule 403. *Cruz*, 156 F.3d at 30. The defendant offers no reason why the testimonial evidence of the assault should be treated differently. The defendant raises this issue only under the rubric of ineffective assistance of counsel, and his trial counsel cannot be said to have fallen below Sixth Amendment standards by failing to make an objection not likely to succeed.

If trial counsel's alleged failures in this regard cannot provide the basis for relief under section 2255, certainly the failure of appellate counsel to raise the same issues on appeal cannot serve that purpose. In addition, the fact that trial counsel essentially withdrew the motion *in limine* concerning evidence of the assault meant that the issue was not preserved for appeal, *United States v. Reed,* 977 F.2d 14, 17 (1st Cir. 1992), so appellate counsel cannot be faulted for failing to raise the issue.

Further, the First Circuit has repeatedly stated that ineffective assistance of trial counsel may not be pursued on direct appeal absent conditions not present here. *E.g., United States v. Mala*, 7 F.3d 1058, 1063 (1st Cir. 1993). The defendant's appellate counsel need not undertake a futile exercise in order to meet Sixth Amendment standards.

F. Jury Instruction — Prior Conviction

The next issue raised by the defendant concerns the jury instructions given at trial. He contends that his attorney provided constitutionally insufficient assistance by failing to request a jury instruction addressing the "limited significance of defendant's prior conviction and drug addiction." Petition at 6A; Defendant's Memorandum at 30-31. The only evidence of a prior conviction presented to the jury was a stipulation of the parties that the defendant had previously been convicted of a felony. Trial Transcript, Volume II ("Tr. II") (Docket No. 106) at 624-25. The prior conviction was an element of the offenses charged in Counts VIII, IX and X of the superseding indictment. The defendant does not cite any page of the trial transcript at which evidence that he was addicted to any drug appears.[9] The government was required to prove, as an element of the offense charged in Count XII of the superseding indictment, that the defendant was a user of a controlled substance at the time he possessed the sawed-off shotgun.

The government suggests that defense counsel could have made a tactical choice not to seek a limiting jury instruction on these points, so as to minimize the impact of the stipulation and any testimony concerning the defendant's drug use. Government's Opposition at 20-21. I agree that, under the circumstances, avoiding emphasis on the defendant's prior conviction and his use of controlled

[9] Indeed, the court instructed the jury that the government did not have to prove that the defendant was addicted to a controlled substance in order to sustain its burden of proof on Count XII. Tr. II at 633.

substances "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. The defendant offers nothing to overcome this presumption[10] and accordingly cannot prevail on this claim.

G. Jury Instruction — Other Acts

The defendant contends that both his trial counsel and his attorney on appeal failed to provide constitutionally sufficient assistance by "not challenging the trial Court's refusal or neglect in giving the jury 'Proposed Instruction Number Three,'" which he presents as follows:

> You are to consider only the charges which are contained in the indictment. You have heard evidence of other acts allegedly committed by Defendant Cruz. That evidence was introduced for a limited purpose. You are not to decide this case based upon your knowledge of those other acts.

Petition at 6A; Defendant's Memorandum at 34. The defendant's argument is based on his contention, belied by the record as discussed above, that evidence of his assault on Thibodeau was evidence of other acts, rather than evidence of one of the crimes with which he was charged. *Id*. at 34-35. This evidence was not admitted as "propensity" or character evidence. Accordingly, the defendant's citation to case law concerning such evidence is irrelevant.

The fact that the defendant presents the text of a proposed jury instruction means that his trial counsel must have proposed it. This is not a case of failure to request a limiting instruction, as the defendant suggests, *id*. at 35, but rather a case in which trial counsel did not again request the court to give the instruction after the court had indicated at trial that it had completed its instructions to the jury

[10] The defendant relies on *Ferguson v. Knight*, 797 F.2d 289, 289-90 (6th Cir. 1986), in which the Sixth Circuit, in summary fashion, held that, where a defense attorney has not requested a jury instruction limiting the use of evidence of a prior conviction, a defendant is entitled to habeas corpus relief. The factual circumstances of the case are not set forth in the *Ferguson* opinion, but the Sixth Circuit did state that its conclusion was compelled by *Dawson v. Cowan*, 531 F.2d 1374 (6th Cir. 1976). *Id*. at 289. In *Dawson*, the defendant was convicted of attempted rape and acquitted on an habitual offender charge, with respect to which evidence of a previous conviction of rape was introduced. 531 F.2d at 1375. The jury was not instructed that the evidence of the prior conviction was to be used only in connection with the habitual offender charge. *Id*. The court held that a limiting instruction was constitutionally required in these circumstances. *Id*. at 1377. Here, the jury was never told the nature of the defendant's previous conviction. In addition to this distinction, the First Circuit has pointed out that a situation in which defense counsel might have decided that a jury instruction limiting consideration of a previous conviction "would not prove very helpful" is "primarily a matter for counsel to decide at trial" unless the failure to give such an instruction would amount to plain error, distinguishing *Dawson* on the basis of the similarity of the charges (continued…)

without including the requested instruction, Tr. II at 651. The lack of such a request or objection means that the matter would only be reviewed on appeal for plain error. *United States v. Mendoza-Acevedo*, 950 F.2d 1, 4 (1st Cir. 1991). If the evidence concerning the assault was properly admitted under *Elder*, there can be no error, let alone plain error, in the omission of the requested charge. Again, appellate counsel is not required by the Sixth Amendment to undertake a futile exercise. For the same reason, trial counsel's failure to request the instruction again at the close of the court's charge cannot provide the basis for section 2255 relief.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 22nd day of August, 2000.

David M. Cohen
United States Magistrate Judge

involved. *United States v. Malik*, 928 F.2d 17, 23 (1st Cir. 1991).